POLITICS

Why the Fifth Circuit Keeps Making Such Outlandish Decisions

The court is leaning into its reputation as a welcoming home for right-wing litigation.

By Stephen I. Vladeck

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Where to even start in cataloging the most ridiculous—and alarming—recent rulings to come out of the U.S. Court of Appeals for the Fifth Circuit? There's a case about whether a class action could go forward that boiled down to a dispute among three Fifth Circuit judges over the meaning of a Bible verse. There's a case in which the Fifth Circuit allowed three doctors to sue the FDA over a tweet intended to discourage ivermectin use that read, "You are not a horse. You are not a cow. Seriously, y'all. Stop it." There's a case in which the Fifth Circuit barred the Biden administration from requiring Navy SEALs to be vaccinated against COVID, because the court's conception of religious liberty supersedes the military's need for frontline troops to be healthy. There's a case in which the Fifth Circuit held that the way Congress funds the Consumer Financial Protection Bureau (a mechanism Congress has regularly used since America's founding) is unconstitutional because Congress only imposed a limit on the appropriation, rather than putting a precise dollar figure on it. There's the Fifth Circuit's repeated insinuation that individual district judges, rather than the Biden administration, are better situated to supervise and direct federal immigration policy. There's … you get the idea. When the hosts of the popular *Strict Scrutiny* podcast devoted an entire hour-long episode to flagging especially problematic Fifth Circuit rulings, they ran out of time.

The Fifth Circuit is the federal appeals court covering Louisiana, Mississippi, and Texas (where I live), and it has in recent years become the place where just about every right-wing litigant who can brings lawsuits to test novel and extreme legal arguments. It's not that a disproportionate percentage of major legal issues are arising *in* those three states; it's that conservative and right-wing litigants are deliberately steering disputes to a handful of sympathetic district judges in Texas, from where they know that any appeal will go to the Fifth Circuit—whose judges are far more likely than others in the country to take their side.

A nationwide challenge to the FDA's approval of mifepristone? Filed in Amarillo. Nationwide challenges to the Biden administration's immigration policies? Filed in Victoria. Elon Musk's new (and laughably weak) lawsuit against Media Matters, which has no geographic connection to the Fifth Circuit whatsoever? Filed in Fort Worth. These aren't exactly destinations for vacations, but they're the typical destinations today for the overwhelming majority of litigation with an obvious rightward ideological or partisan tilt.

Back in April, David A. Graham wrote in *The Atlantic* about the rise of "total politics"—where our political institutions have gravitated away from behaving with prudence in favor of scoring short-term political points. All that matters is #winning, long-term institutional consequences be damned.

The decision that could end voting rights

As alarming a development as that is in the context of the democratically elected branches (where voters could at least theoretically push back), it's even worse when it comes from unelected judges—whose legitimacy *depends* on at least a loose public belief in their prudence. And especially when these rulings have consequences far outside the borders of its three states, the Fifth Circuit's run of sweeping decisions undermines public faith in the federal judiciary nationally—not just from the eastern border of New Mexico to the western border of Alabama.

What the Fifth Circuit is doing is participating in an extraordinary power grab, indifferent to the procedural rules that are supposed to constrain the powers of unelected judges. For instance, the Fifth Circuit regularly holds that challengers to whom it is sympathetic have standing—the right to bring a suit—in contexts in which the Supreme Court has, for decades, held to the contrary.

The judges do this not because they have an unusually capacious approach to standing; they routinely reject the standing of plaintiffs to whom they are

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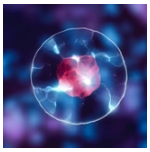

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less sympathetic. Rather, they bend over backwards to take procedural shortcuts when they want to rule on the merits, such as in the challenges to the Biden administration's proposed requirement that large employers require COVID vaccinations or regular tests. Even though the Fifth Circuit had only a 10 percent chance of winning the "inter-circuit lottery" that randomly assigns this type of dispute to a federal appeals court, it decided to jump the gun—issuing a premature decision, *before* the lottery took away its power, that the Biden rule was unlawful. (The Sixth Circuit, which "won" the lottery, quickly vacated the Fifth Circuit's decision.)

Moreover, the Fifth Circuit's approach to both constitutional and statutory interpretation reflects a rather wooden application of even the conservative methodologies championed by the current Supreme Court. Consider the court of appeals' ruling in *United States v. Rahimi*, in which the panel struck down a federal law barring people subject to domestic-violence-related restraining orders from possessing firearms. Even though the federal government offered numerous examples of founding-era laws that restricted firearm possession by "dangerous" individuals, the court of appeals rejected that analogy—concluding that domestic-violence restraining orders were too specific a subcategory of danger for the comparison to hold. (In another bizarre procedural move, the court subsequently amended its analysis although no party asked it to—perhaps in response to some of the public criticism that had emerged.)

The same cherry-picking of historical examples can be found in the CFPB case, in which the court of appeals either ignored or unpersuasively distinguished countless historical examples of similar congressional-funding statutes. When, at the recent Supreme Court oral argument in the case, Justice Samuel Alito tried to defend the Fifth Circuit's efforts, U.S. Solicitor General Elizabeth Prelogar sarcastically conceded that, at the very least, none of those examples involved an agency with the same name.

The Supreme Court's extreme power grab

The Fifth Circuit's approach to statutory interpretation has been just as transparently results-oriented. One especially notorious example is the court's conclusion that the Nuclear Regulatory Commission lacks the statutory power to promulgate rules for the temporary storage of spent nuclear fuel—at least in part because the court determined that the Atomic Energy Act didn't clearly delegate such authority. But if the NRC isn't authorized to provide for the temporary storage of nuclear waste, who is? (The court's opinion doesn't say.)

The upshot of these statutory holdings is not, as some of the court's judges have insisted, to return power to Congress; it's to frustrate federal regulation in general—because even a functioning Congress (to say nothing of the current one) would have neither the time nor the wherewithal to legislate with the amount of subject-matter specificity that the Fifth Circuit demands.

Throughout these decisions, the Fifth Circuit has shown a remarkable lack of regard for the Supreme Court—which not only keeps reversing it, but keeps granting emergency relief in cases in which the Fifth Circuit refused to do so, or vacating emergency relief that the Fifth Circuit agreed to provide. Take just three examples: After a federal judge blocked a controversial Texas law barring most content moderation by social-media providers, the Fifth Circuit unblocked it pending appeal, only to have the Supreme Court step in to put the law back on hold. Even though the Supreme Court's intervention signaled that at least five justices were likely to side with the district court and conclude that the Texas law was unconstitutional, the Fifth Circuit went ahead and decided that the Texas law was kosher.

A similar story unfolded in the mifepristone case—where the Supreme Court issued a stay of Judge Matthew J. Kacsmaryk's ruling (which would have massively limited nationwide access to the abortion pill), after the Fifth Circuit had refused to do so. Once again, the Supreme Court sent a pretty clear message that Kacsmaryk's ruling was not likely to survive, but the Fifth Circuit affirmed it on the merits anyway. And just last month, the Fifth Circuit struck down the Biden administration's rule limiting the distribution of "ghost guns," even though the Supreme Court intervened *twice* earlier this summer to put the rule back into effect after the Fifth Circuit had blocked it. So far this term, the Supreme Court has granted emergency relief three times. Not only did all three of those cases come from the Fifth Circuit; in all three, the Fifth Circuit had gone the other way.

This disregard for the Supreme Court has the ironic effect of making the justices look more moderate. Last term, for example, the Supreme Court reversed the Fifth Circuit in seven of the nine cases it reviewed—the highest rate for any lower court in the country. A similar theme is likely to emerge from this term, in which as many as 20 percent of the cases the justices decide are likely to come from Louisiana, Mississippi,

ideologically extreme than the Fifth Circuit. These days, that's not saying all that much.

Even conservative scholars have started expressing alarm about these trends. In the November issue of the *Harvard Law Review*, the professors William Baude and Samuel Bray warned that "we have arrived, for the first time in our national history, at a state of affairs where almost every major presidential act is immediately frozen" by federal courts—most commonly in the Fifth Circuit—forcing the Supreme Court to step in at premature stages. In their words, "This is bad law and bad democracy. It cannot go on forever."

The care and feeding of Supreme Court justices

But whereas conservative scholars have begun to raise concerns about these developments, the Supreme Court, which has not been shy about chastising misbehaving lower courts in the past, has thus far been mum. The lack of rebuke may explain why some Fifth Circuit judges are leaning into their newfound infamy. One of the court's most visible judges, James Ho, regularly lectures law-school audiences about the importance of judicial "courage"—that judges shouldn't shy away from unpopular opinions.

Ho's not-so-subtle message is that criticism is actually evidence of *good* judicial rulings; in his world, there's no such thing as bad publicity. But whether this is what these judges truly believe or just how they think they need to behave in order to have any shot at a Supreme Court nomination in a future Republican presidency, the bottom line is the same: The Fifth Circuit is the bull in the rule-of-law china shop—and it seems remarkably indifferent to what happens to public faith in the judiciary when it keeps breaking things.

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